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No. 1

Supreme Court, U.S.
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In The

Supreme Court of the United States

GERALD RAYBORN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the prosecution and conviction of the petitioner in the arson case pursuant to Title 18 U.S.C. § 844(i) was invalid because of the district court's unconstitutional exercise of Congressional power under the Commerce Clause of the United States Constitution.

2. Whether the evidence submitted at trial was sufficient to establish the defendant's guilt beyond a reasonable doubt.

3. Whether the district court committed error in allowing the government to present evidence of prior conduct of the defendant when such evidence was inadmissible under Rule 403 and/or Rule 404(b), Federal Rules of Evidence.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PETITION FOR WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED
18 U.S.C. § 844(i) 2

STATEMENT OF THE CASE 2

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI 4

Relevant Facts 4

ARGUMENT 20

Issue One 20

Issue Two 29

Issue Three 32

CONCLUSION 37

APPENDIX

Opinion of the Court of Appeals for the Sixth Circuit in *United States v. Rayborn*, 495 F.3d 328 (6th Cir. 2007) ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970) 29

Jones v. United States, 529 U.S. 848, 120 S.Ct. 1904 (2000) ..... *passim*

Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239 (1946) 36

Lassiter v. Equitable Fire and Marine Ins. Co., 483 S.W.2d 740 (Tenn. App. 1972) 33

Old Chief v. United States, 519 U.S. 152, 117 S.Ct. 644 (1997) 35, 36

Price v. Allstate Ins. Co., 614 S.W.2d 377 (Tenn. App. 1981) 34

Russell v. United States, 471 U.S. 858, 105 S.Ct. 2455 (1985) 21

United States v. Carr, 271 F.3d 172 (4th Cir. 2001) 23

United States v. Davies, 394 F.3d 182 (3rd Cir. 2005) 23

United States v. Gillespie, 452 F.3d 1183 (10th Cir. 2006) 22, 23, 28

United States v. Jenkins, 345 F.3d 928 (6th Cir. 2003) 31

United States v. Lamont, 330 F.3d 1249 (9th Cir. 2003) 23

United States v. Merriweather, 78 F.3d 1070 (6th Cir. 1996) 36

TABLE OF AUTHORITIES – Continued

Page

United States v. Moccia, 681 F.2d 61 (1st Cir. 1982)..... 36

United States v. Odom, 252 F.3d 1289 (11th Cir. 2001)..... 23

United States v. Rayborn, 138 F.Supp.2d 1029 (W.D. Tenn. 2001) 3, 24

United States v. Rayborn, 312 F.3d 229 (6th Cir. 2002)..... 3, 25, 26

United States v. Rayborn, 495 F.3d 328 (6th Cir. 2007)..... 1, 4, 27, 32

United States v. Rea, 300 F.3d 952 (8th Cir. 2002)..... 22

United States v. Tocco, 200 F.3d 401 (6th Cir. 2000)..... 31

United States v. Wesley, 417 F.3d 612 (6th Cir. 2006)..... 35

OTHER AUTHORITIES

Federal Rules of Evidence

Rule 403 ..... 32, 35, 36

Rule 404(b)..... 5, 32, 36

Tennessee Code Annotated

§ 56-7-801..... 14, 33

§ 56-7-802..... 14, 33

TABLE OF AUTHORITIES – Continued

Page

Title 18 U.S.C. § 844(i) ..... *passim*

Title 18 U.S.C. § 1341 2

Title 28 U.S.C. § 1254 1

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Gerald Rayborn, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered July 26, 2007, a copy of which is attached herewith. The decision is reported as *United States v. Rayborn*, 495 F.3d 328 (6th Cir. 2007).

OPINION BELOW

The Court of Appeals for the Sixth Circuit entered its order affirming the judgment of the district court on July 26, 2007. A copy of the opinion, *United States v. Rayborn*, 495 F.3d 328 (6th Cir. 2007), is annexed in the appendix.

JURISDICTION

On July 26, 2007, the Court of Appeals for the Sixth Circuit entered its ruling affirming the district court. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by Title 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

Title 18 U.S.C. § 844(i)

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

STATEMENT OF THE CASE

Nature of the Case

Gerald Rayborn appealed his conviction in the United States District Court for the Western District of Tennessee before the Honorable Bernice S. Donald. The Judgment Including Sentence under the Sentencing Reform Act was docketed on December 15, 2005,

and a timely Notice of Appeal was filed on December 9, 2005.

Proceeding and Disposition in the trial court

On December 16, 1999, a federal grand jury in the Western District of Tennessee returned an indictment charging the petitioner with arson, in violation of Title 18 U.S.C. § 844(i), and mail fraud, in violation of Title 18 U.S.C. § 1341.

The petitioner entered a plea of not guilty, and on March 13, 2000, he filed a motion to dismiss the indictment as to all counts. The motion was denied by the district court, and on June 9, 2000, the petitioner filed a motion to reconsider. On August 25, 2000, the Honorable Bernice B. Donald entered an opinion in *United States v. Rayborn*, 138 F.Supp.2d 1029 (W.D. Tenn. 2001), granting the motion to reconsider and dismissing the charge of arson.

The government appealed Judge Donald's ruling, and on December 6, 2002, the Sixth Circuit issued its opinion in *United States v. Rayborn*, 312 F.2d 229 (6th Cir. 2002), reversing the order of the district court and remanding the case for trial.

The first jury trial began on July 14, 2003, but the court declared a mistrial on July 28 when the jury failed to reach a unanimous verdict. The petitioner's second trial began on August 10, 2004. The proof was concluded on August 19, 2004. On August 20, the jury began its deliberations and returned its verdict of

guilty on all three counts of the indictment on the same date.

The petitioner filed a motion for a new trial on August 26, 2004, and on October 22, 2004, the district court entered its order denying the motion.

The district court sentenced the petitioner to 60 months imprisonment on December 8, 2005. Four and one-half months of the sentence were to run concurrently with the earlier sentence imposed in CR-04-20177. The petitioner filed his notice of appeal on December 9, 2005, and the district court allowed him to remain on bond pending appeal.

Proceeding and Disposition in the Sixth Circuit Court of Appeals

The petitioner filed a notice of appeal on December 9, 2005, and on July 26, 2007, the Sixth Circuit Court of Appeals entered its opinion in *United States v. Rayborn*, 495 F.3d 328 (6th Cir. 2007), affirming the judgment of the district court.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

Relevant Facts

At the beginning of the trial on August 10, 2004, the district court heard the defendant's third motion *in limine* filed December 8, 2003, (DEFENDANT'S THIRD MOTION *IN LIMINE*, R-184). The motion

sought to exclude evidence from Lisa Foster, or any other witness, concerning the New Sinai Missionary Baptist Church's purchase of vehicles for Rev. Rayborn or other expenditures on his behalf.

The motion was brought pursuant to Rule 404(b), Federal Rules of Evidence. Government counsel said that the evidence was relevant to the mail fraud count, since one element of the offense was to obtain money by fraud. Rev. Rayborn was not the beneficiary of the fire insurance policy, and therefore the government intended to prove that "the church and Rev. Rayborn, when it comes to the financial aspect of the church, are the same." The government wished to show that the defendant has previously used the church's finances for his personal gain, and he would benefit from the proceeds of the insurance policy. Defense counsel responded that it is undisputed that the defendant had power of attorney granted to him by the church. The government should not be allowed to put on proof of an issue which was of its own making. (Transcript, Trial [TR], 8/12/04, COURT AND COUNSEL, pages 7-11).

The court said the proposed testimony of Lisa Foster would not be admissible "because it's simply used to show that it was a bad act with respect to misusing church funds." The motion *in limine* was granted with respect to her. (TR, 8/12/04, COURT AND COUNSEL, pages 11-12).

Vatonia Gray testified that on August 25, 1998, at about 4:30 or 4:45 p.m., she met at the New Sinai

Missionary Baptist Church with Trashonda Anderson and Carolyn Woodard to discuss the upcoming marriage of Anderson at the church. Woodard was her friend, but she did not know Anderson at that time. (TR, 8/12/04, GRAY, pages 54-59). Neither she nor Anderson had been inside the church, and they wished to see what the facilities were like. They saw Rev. Rayborn and introduced themselves to him. After talking to them about the church for about 10 or 15 minutes, he left and they did not see him again. (TR, 8/12/04, VATONIA GRAY, pages 59-60).

Around 5:45 p.m., the lights in the church started flickering and making a "popping" sound, and soon thereafter the lights went out completely. The ladies started to exit the church, and they saw smoke coming from under a door. They knocked on the door for a moment, and then they ran out of the church. The door had a sign with "Pastor's Office" on it. They went to this office because they believed that Rev. Rayborn was still in the church. Once they got out of the church, Gray called the fire department. (TR, 8/12/04, VATONIA GRAY, pages 64-68).

Carolyn Woodard testified that she met Trashonda Anderson though Vatonia Gray, and they were at the church on August 25, 1998, to finalize Anderson's wedding plans. She saw Rev. Rayborn and asked him certain questions about the use of the sanctuary for the wedding. After he left, she "thought" she saw him again, but she did not see him leave the church. (TR, 8/12/04, WOODARD, pages 93-97).

On cross-examination, Woodard testified that she did not smell any diesel fuel or gasoline while at the church. She talked to Rev. Rayborn twice inside the church, and he appeared calm to her. (TR, 8/12/04, WOODARD, pages 106-108).

Trashonda L. Brown, who was Trashonda Anderson at the time of the fire, testified by deposition. Vatonia Gray called Rev. Rayborn from Carolyn Anderson's house to inquire whether they could visit the church on August 25, 1988. (TR, 8/12/04, BROWN, pages 128-129). Once she saw the lights flicker and heard a "loud boom," she knocked on the door marked "Pastor's Office." When she did not get an answer, she ran out of the church. (TR, 8/12/04, BROWN, pages 137-138).

Matthew Gray was the supervisor of the special investigation unit at Grange Insurance Company on August 25, 1998. He investigated insurance claims, including the verification of facts and circumstances which surrounded these claims. He met Rev. Rayborn on August 28, 1998, because Rev. Rayborn's name was on the loss report that was initially sent to Grange. Gray mailed him a proof of loss and he received the notarized, completed proof of loss form from Rev. Rayborn on October 23, 1998, through the law office of James Wilson. (TR, 8/13/04, MATTHEW GRAY, pages 305-315).

Rev. Rayborn told Gray that he arrived at the church in the morning of August 25, and he was the only one in the church until 5:00 p.m. Some people

came to the church, but they did not go to the back portion of the church. He said that he and his wife had the only keys to the pastor's office. There is a door which leads from the pastor's office to the pastoral facilities. He told Gray that the door stayed locked and only he had the key to it. Rev. Rayborn also told Gray that there was a can of diesel fuel and two cans of lighter fluid in the garage area. (TR, 8/13/04, MATTHEW GRAY, pages 318-319).

On August 28, 1998, Rev. Rayborn did not bring his attorney with him to meet Gray. He answered all questions which Gray asked him. The same was true with respect to a subsequent interview on August 29. (TR, 8/13/04, MATTHEW GRAY, pages 320-322). Gray was not aware of any documents that the church refused to give to the insurance company. (TR, 8/13/04, MATTHEW GRAY, pages 328-329).

David T. Stafford testified as an expert in the field of analytic and forensic chemistry, specifically the analysis of fire debris. He analyzed samples from the church fire to determine whether they contained an accelerant. (TR, 8/13/04, STAFFORD, pages 491-492). He described the process by which he discovered certain accelerants, including gasoline and diesel fuel. He said that a combination of diesel fuel and gasoline had been found in suspected arson cases before, since the combination was a safe accelerant. (TR, 8/13/04, STAFFORD, page 504).

He referred to the a product called Goof-Off which contains some of the same compounds as

gasoline. He did not believe he had any Goof-Off in the samples. He had seen information about Tam-Pro Roofing Adhesive, and it has some of the same compounds as diesel fuel. He used a gas chromatograph to run his tests. He compared the use of a chromatograph with another machine called a mass spectrometer. The latter machine does not separate compounds, but it does provide for a better compound identification. The cost of the use of a mass spectrometer was prohibitive, and he believed that the gas chromatograph provided sufficient results. (TR, 8/13/04, STAFFORD, pages 505-509).

Special Agent Mark T. Teufert, a certified fire investigator with the Bureau of Alcohol, Tobacco, and Firearms, testified as an expert witness in the determination of cause and origin of fires. (TR, 8/16/04, TEUFERT, pages 581-585). He conducted an investigation of the fire, and after giving a lengthy explanation of his results, he testified that he saw "two very separate distinct fire events taking place in this building." He knew from his interview of witnesses and firemen, as well as his examination of the scene, that there was a fire in the attic. With particular reference to the pastor's office, he said that "we have another fire problem on the ground floor separate from what we're seeing up in the attic." (TR, 8/16/04, TEUFERT, pages 626-627).

In describing the "pour patterns" of flammable liquid on the carpet and the detection of gasoline and diesel fuel in a single sample, Teufert said that "what an arsonist will typically do will mix the two together

so you have the benefits of gasoline, a very volatile substance, combined with the relative stability of diesel fuel, a relatively stable substance." (TR, 8/16/04, TEUFERT, page 676). Teufert identified paper envelopes which were placed in an access panel of a freezer in a garage and twisted around an appliance cord. In his experience, he had noted that:

> an arsonist will ignite paper products, they will damage the appliance cord, the interior of the appliance to make it appear as if you have some type of electrical failure, when, in fact it was an intentionally set fire to give the appearance of an electrically caused fire.

(TR, 8/16/04, TEUFERT, pages 679-683).

He concluded that the fire was set by someone who "intentionally poured multiple areas in these three offices of the church in addition to igniting a fire in the attic in the southwest corner of the church." (TR, 8/16/04, TEUFERT, page 683).

Despite the significant amount of accelerants which Teufert believed were used in the fire, he said that no person inside the church at the time of the fire smelled any gasoline or diesel fuel. (TR, 8/16/04, TEUFERT, pages 715-719).

Teufert said that there was a pull-down stair assembly to the attic which was closed at the time of the fire. Defense counsel asked whether it was his theory of the case:

> that Rev. Rayborn pulled down that attic stairway while the women were in the sanctuary nearby, pulled down the attic stairway in the tape room . . . while the women were working in the sanctuary nearby, climbed the attic stairway, walked across the joists in the attic, came over here where the blue square is, poured gasoline and diesel fuel in the attic, came back over the joists, came back down the stairway, lifted the . . . stairway back up and then left without being discovered; is that – the government's theory.

Teufert responded that counsel's statement is "the general theory or opinion of how this fire started." (TR, 8/16/04, TEUFERT, pages 725-726).

Special Agent Brian Hoback of the Bureau of Alcohol, Tobacco and Firearms testified as an expert in the area of cause and origin of fire investigations, including explosions because of the fire. (TR, 8/16/04, BRIAN HOBACK, pages 759-763). He ruled out the possibility of a gas explosion at the church. (TR, 8/16/04, BRIAN HOBACK, page 776). He found no evidence that the fire was electrical, and his conclusion, along with that of Teufert, was that the cause of the fire was arson. (TR, 8/16/04, BRIAN HOBACK, pages 778-780).

Defense counsel posed an objection to testimony about "church expenditures, evidence of automobile purchases back in 1995 and '96, [and] I want to make sure the record reflects our objection to that." The court said the matters were ruled on in the hearing

on the motion *in limine*, but it would note the defendant's continuing objection. This ruling dealt only with Lisa Foster and a car that was purchased from Gwatney Chevrolet. (TR, 8/16/04, COURT AND COUNSEL, pages 818-819).

Jacquelyn D. Ford testified that she was the secretary of the church and a member of the Board of Trustees. As secretary, she and another person were charged with keeping the financial records. (TR, 8/16/04, FORD, pages 821-823). Ford identified Rev. Rayborn's signature on numerous checks from the church. The checks were introduced into evidence and the district court noted the defense objections for the record. (TR, 8/16/04, FORD, pages 838-854).

The Board of the church considered the question of whether to purchase a Corvette and an RV, but Ford did not remember who recommended the purchases. On another matter, Rev. Rayborn may have recommended that the church add on some garages. There was a $29,000 check which was used to pay off the Corvette. (TR, 8/16/04, FORD, pages 858-860).

Defense counsel objected to the government's question about the purchase of another Corvette, since any expenditures in 1997 were irrelevant. The court noted the government's theory that "the defendant had almost exclusive control of the church's finances and used it basically as its own, so I'm allowing the line . . . " Defense counsel renewed his objections to evidence that Rev. Rayborn misused

funds, but the objection was again overruled. (TR, 8/16/04, FORD, pages 860-862).

Ford testified that Rev. Rayborn purchased another Corvette, and the first was traded in. (TR, 8/16/04, FORD, pages 862-863).

On cross-examination, Ford testified that Rev. Rayborn has the power of attorney for the church. She also talked about the numerous ministries of the church, including matters where Rev. Rayborn would pay expenses from his own pocket. His power of attorney would permit him to pay for repairs to the church and other expenditures. There has never been any attempt by the church authorities to revoke that power of attorney. (TR, 8/16/04, FORD, pages 866-874).

Mattie Stewart is a member of the church's Board of Trustees. She testified that Rev. Rayborn recommended that the church purchase a church vehicle for him, as well as a pastoral sanctuary with a bedroom area, a hot tub, and a shower. (TR, 8/17/04, STEWART, pages 11-18). Prior to the fire, Rev. Rayborn signed most of the church's checks. (TR, 8/17/04, STEWART, page 21). Any significant decisions made by Rev. Rayborn were taken to the church congregation. The improvements which he made were known by the church, which was satisfied that he was acting in the church's interest. (TR, 8/17/04, STEWART, page 24).

Rick Wheatley, the Controller at Gwatney Chevrolet, testified about two bills of sale for 1995 Chevrolet

Corvettes on July 26, 1995, and April 12, 1996. (TR, 8/17/04, WHEATLEY, pages 91-93).

Donald Lee Bittle, the owner of Don's Paint and Body Shop in Memphis, testified that he performed repairs on Rev. Rayborn's 1995 Isuzu Rodeo in the amount of $10,651.34. There were three payments of $6,000 by check, $3,000 cash, and another check for $1,651.34. (TR, 8/17/04, BITTLE, pages 95-97).

The government read a stipulation to the jury, much of which referenced the activities of the church which the government contended related to interstate commerce. (TR, 8/17/04, COURT AND COUNSEL, pages 100-107).

Ronald Capehart was employed by Grange Mutual Casualty Company at the time of the fire, and the church was the policyholder. He inspected the church and concluded that it was a total loss. Since the policy was in force for over 90 days, under the "Tennessee Value Statute"[1] he would have paid the policy limits of $778,752 plus four percent interest. The church would not be required to use all the proceeds in the rebuilding process. (TR, 8/17/04, CAPEHART, pages 107-112). On cross-examination, Capehart said that a valued policy requires the insurance company to value the property it intends to cover. Counsel asked whether it was against the law

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[1] The legal term is "valued policy," and the applicable Tennessee statutes are § 56-7-801 and § 56-7-802.

for an insurance company to write a policy for more than a church is worth. Capehart did not know, but he said that the company and the property owner have 90 days to agree on an amount. Counsel suggested that the premium charged by the company must be based upon the value of the property, but Capehart said that he did not know. (TR, 8/17/04, CAPEHART, pages 115-117).

The government rested its case, and the defendant made a motion for judgment of acquittal. The motion was denied by the district court. (TR, 8/17/04, COURT AND COUNSEL, pages 122-123).

Robert Edwards, a heating and air maintenance manager, worked as an HVAC man in the attic of the church. He had been in the attic about a month prior to the fire. A person had to enter the attic from a pull-down stairway. The attic did not have a plywood deck, and he had to walk across the joists in order to get around. There was a small piece of decking where the furnace was located. (TR, 8/17/04, EDWARDS, pages 186-192). He said that it was difficult to walk in the attic. He had to squeeze around some rafters, and there was no flooring. He had to be careful to keep from falling through the ceiling. (TR, 8/17/04, EDWARDS, pages 193-194).

William Allen of Allen Construction Company worked on the roof of the church in 1994. He used a roll roofing made from petroleum product and rubber, as well as a modified Bitumen adhesive which is called Tampco roofing adhesive. In 1997, he used the

same products again on a church addition and the double car garage at the church. (TR, 8/17/04, WILLIAM ALLEN, pages 284-287).

Dr. Wolfgang Bertsch, a chemistry professor at the University of Alabama, testified as an expert in the field of analytical chemistry, with an emphasis on the analysis of suspect arson samples by gas chromatography and mass spectrometry. (TR, 8/18/04, BERTSCH, pages 1-11). Bertsch disagreed with Dr. Stafford's earlier opinion that the arson samples contained gasoline and diesel fuel. He explained the principles behind both gas chromatography and mass spectrometry, and said that the latter is "infinitely superior" to the former. (TR, 8/18/04, BERTSCH, pages 11-16). He challenged much of Stafford's findings regarding the nature of the accelerants found in the carpet samples.

Jerry Rosser testified that he used a product called Goof-Off to clean labels on some tapes and other equipment in the church. He kept the plastic bottle of Goof-Off in the attic, and there was more Goof-Off in a locked room which contained video equipment. There were circuit breakers in the room which were taped in the "on" position to keep them from tripping or having someone turn them off. (TR, 8/18/04, ROSSER, pages 80-84).

William Allen was recalled as a witness. He had procured a label off a cold process adhesive bucket, and the label showed that the material he used on the roofing of the church was called Tampro. (TR, 8/18/04,

WILLIAM ALLEN, pages 104-105). The name Tampro was first used in 1998, but the adhesive was previously called Tamko CPA. (TR, 8/18/04, WILLIAM ALLEN, pages 115-116).

Dr. Darlene Loprete, an associate professor of chemistry at Rhodes College in Memphis, testified as an expert in chemistry, biochemistry, and the proper use of the techniques of gas chromatography and mass spectrometry. (TR, 8/18/04, LOPRETE, pages 118-123). She said that the combination of the two techniques is superior to gas chromatography alone. She ran a test with the latter technique and used Tampro adhesive and Goof-Off. She found that these substances might have been present in Stafford's samples and could have produced false positive results for arson accelerants. (TR, 8/18/04, LOPRETE, pages 123-129).

Stacy Johnson is Rev. Rayborn's daughter. She is the choir director of the children, and there was a planned rehearsal on the night of the fire. Rev. Rayborn generally attended the rehearsals. Rev. Rayborn had numerous pictures of his family and church members on the walls of his office, and Ms. Johnson had her first bedroom suite stored in the garage. All were destroyed in the fire. (TR, 8/18/04, STACY JOHNSON).

Rev. Rayborn testified in his own behalf. He began his ministry in Eads, Tennessee, in 1976, and he is now the pastor of New Sinai Missionary Baptist Church. He denied that he burned the church as

charged in the indictment. (TR, 8/18/04, RAYBORN (Direct Examination), pages 3-5).

Government counsel asked Rev. Rayborn about the layout of the church and the pastor's office. He left the church on the day of the fire around 5:30 or 5:45 p.m. to go home. He stopped and talked to Johnny Allen, who needed the church's tax slip because of some brick work. Rev. Rayborn went back into the church, got the slip for Allen, and then proceeded home. He saw the three women in the church when he went back to the church. (TR, 8/18/04, Cross Examination of Gerald Rayborn, pages 36-38).

Rev. Rayborn testified that he did not have a personal bank account prior to the fire. He identified a $6,000 check signed by him to Don's Paint and Body shop for a car which was in his name and was not a church vehicle. He signed another check on April 25, 1997, for $1,651.34, and he remembered paying cash along with the check. He paid Master Charge another check, and the account is used for both himself and the church. He could not remember whether he paid the money back to the church, but he said that if the money was for his personal use, he probably did pay it back. Defense counsel noted that the checks referred to were those already in evidence. (TR, 8/18/04, Cross Examination of Gerald Rayborn, RAYBORN, pages 48-51).

Government counsel asked Rev. Rayborn about other checks on the church's account as well as certain financial withdrawals from the account. He

asked whether Rev. Rayborn had paid the church back as to each expenditure for his personal use, but Rev. Rayborn could not recall the details of each item. The suitcase which Mr. Willingham recovered from the church contained $23,000, and Rev. Rayborn said it would be the "church's call" as to whether that money would be used to help pay off the church's debt. Rev. Rayborn had power of attorney over the church's bank accounts, and government counsel emphasized that he had the authority to spend the $23,000 as "you see fit." (TR, 8/18/04, Cross Examination of Gerald Rayborn, RAYBORN, pages 51-60).

When court adjourned for the day, defense counsel told the district court that he had a standing objection to the government's use of the checks for the defendant's personal expenditures. The court noted the continuing objection and overruled it. (TR, 8/18/04, COURT AND COUNSEL, page 67).

When the trial resumed on Thursday morning, August 19, 2004, defense counsel repeated his objections about certain portions of the government's questioning. Counsel mentioned the use of the church's tax-exempt status with respect to concrete being poured for an adjacent house. He also objected to the checks introduced at trial, more checks which the government intended to use, and Rev. Rayborn's prior statements. Government counsel said that the evidence goes to Rev. Rayborn's "motive, intent, and opportunity . . . " in manipulating the church's bank account by exercising control over the money therein and using it for his personal gain." The court

sustained the defense objection to the introduction of more checks, but it let the testimony about the use of the tax exempt status stand. (TR, 8/19/04, COURT AND COUNSEL, pages 886-895).

Rev. Rayborn denied that he designed the pastoral facility, but he acknowledged that the facility had a king size bed, a hot tub, showers, and a kitchen. He testified that he lived within walking distance of the church. (TR, 8/19/04, RAYBORN, pages 902-903).

At the conclusion of all the proof, defense counsel renewed the motion for a judgment of acquittal. The court denied the motion. (TR, 8/19/04, COURT AND COUNSEL, pages 987-989).

ARGUMENT

ISSUE ONE:

Whether the prosecution and conviction of the petitioner in the arson case pursuant to Title 18 U.S.C. § 844(i) was invalid because of the district court's unconstitutional exercise of Congressional power under the Commerce Clause of the United States Constitution.

The petitioner would submit that this Honorable Court should grant the petition for certiorari in order to clarify the reach of the Commerce Clause of the United States Constitution to churches and other

establishments which have minimal business connections, if any, to interstate commerce.

This Court held in *Jones v. United States*, 529 U.S. 848, 120 S.Ct. 1904 (2000), that a private residence does not fall within the confines of the arson statute, Title 18 U.S.C. § 844(i), because a residence which is "not used for any commercial purpose does not qualify as property 'used' in commerce or commerce-affecting activity; . . . " *Jones*, 120 S.Ct. at 1908. The Court discussed the legislative history of Title 18 U.S.C. § 844(i), and cited *Russell v. United States*, 471 U.S. 858, 105 S.Ct. 2455 (1985), where the petitioner attempted to set fire to a two-unit apartment from which he received rental income. Since he earned rental income and treated the apartments as business property for tax purposes, the Court said that "[t]he property was . . . being used in an activity affecting commerce within the meaning of § 844(i)." *Jones*, 120 S.Ct. at 1909 (quoting *Russell*). The question in *Jones* was different: "Does § 844(i) cover property occupied and used by its owner not for any commercial venture, but as a private residence. Is such a dwelling place, in the words of § 844(i), 'used in' . . . any activity affecting . . . commerce?" *Id.*

Congress did not intend to invoke the full authority under the Commerce Clause, since the word "used" signifies that Congress "require[d] that the damaged or destroyed property must itself have been used in commerce or in an activity affecting commerce." *Jones*, 120 S.Ct. at 1909-10 (citations omitted). Although Title 18 U.S.C. § 844(i) does not

exclude any particular building, it requires "that the building be 'used' in an activity affecting commerce. That qualification is most sensibly read to mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Jones*, at 1910.

Justice Stevens, concurring, noted his "firm belief that we should interpret narrowly federal criminal laws that overlap with state authority unless congressional intention to assert its jurisdiction is plain." *Jones*, at 1912-13 (Stevens, J., concurring). Justice Thomas' separate concurring opinion, joined by Justice Scalia, expressed "no view on the question whether the federal arson statute . . . , as there construed, is constitutional in its applications to all buildings used for commercial activities." *Jones*, at 1913 (Thomas, J., concurring).

United States v. Gillespie, 452 F.3d 1183 (10th Cir. 2006), citing a number of authorities, including *Jones v. United States*, *supra*, observed that a church is not normally a building used in interstate commerce:

> After *Jones*, the prevailing view is that "[t]he fact that a building is a church, without more . . . does not bring it within the ambit of section 844(i)." *United States v. Rea*, 300 F.3d 952, 960 (8th Cir. 2002). This is because "[a] church, like the owner-occupied residence considered in *Jones*, generally does not function in a manner that places it in any significant relationship with commerce,

> let alone interstate commerce." *United States v. Lamont*, 330 F.3d 1249, 1254 (9th Cir. 2003); *see also United States v. Davies*, 394 F.3d 182, 193 (3rd Cir. 2005) ("[A] normal church is no more active[ly] used for commercial purposes than was the residential hours in *Jones*."); *United States v. Carr*, 277 F.3d 172, 179 (4th Cir. 2001) ("[U]se of a building as a church does not alone qualify it as being 'used in' interstate commerce."). Accordingly, the circuits have held that "a passive, past, or passing connection to interstate commerce," *United States v. Odom*, 252 F.3d 1289, 1296 (11th Cir. 2001), such as receiving donations from out-of-state donors, using Bibles purchased from out-of-state source, and indirectly contributing to an out-of-state organization, *see id.* at 1296-97; collecting money from members to purchase church supplies from out-of-state vendors and to fund out-of-state missions, *see Davies*, 394 F.3d at 186; and receiving gas from out-of-state pipelines, obtaining insurance from an out-of-state company, purchasing goods from out-of-state, and serving out-of-state worshipers, *see Lamont*, 330 F.3d at 1250, do not bring a church within the scope of § 844(i).

Gillespie, 452 F.3d at 1187. The court said, however, that churches may engage in commercial functions that will bring them within the ambit of the arson statute. *Id.*

The district court in this case applied *Jones* to the activities of the New Mount Sinai Missionary Baptist Church ("SMBC") and said:

> SMBC is a church. Its main function is to facilitate worship, and is therefore used for non-commercial activities. Unlike a manufacturer, or a retailer, SMBC is not engaged in the production or the selling of goods . . . SMBC's activities are all integral to worshiping. Tithing is necessary to sustaining worship services and rooted in the Christian doctrine. SMBC's radio programs do not sell goods or services, but instead broadcast its sermons. Its gospel programs, although in one sense entertainment, are also worship-centered and part of the ministry of the church. Therefore, the Court finds that SMBC's buildings were used for non-commercial consequences interstate in nature. However, in today's society, it is difficult to fathom a situation that would not have some interstate nexus. Therefore, to categorize the church's activities that tend to congregants' spiritual needs a commercial enterprise would be to obliterate the distinction between commercial and non-commercial activity,. . . .

United States v. Rayborn, 138 F.Supp.2d 1029, 1035 (W.D. Tenn. 2001). Judge Donald said that the government was unable to show that the church's "radio broadcasts, gospel programs, or picnics are anything but minor church centered events largely intrastate in scope." *Rayborn*, 138 F.Supp.2d at 1036. The level

of the church's operation "and its subsequent impact on interstate commerce, is just too *de minimus* to substantially impact interstate commerce." *Id.*

The Sixth Circuit reversed in *United States v. Rayborn*, 312 F.3d 229 (6th Cir. 2002). The court went over the two-pronged inquiry of *Jones*: (1) the function of the building itself, and (2) whether that function affects interstate commerce. The limited use of congressional power, as explained in *Jones*, required that the government show an "active employment [of the building] for commercial purposes, . . . " *Rayborn*, 312 F.3d at 233. The "function" prong established that the building functioned as a church. The court added that "[w]hile there were other activities in the building – such as radio broadcasts, gospel concerts, and free buffet breakfasts – none of these would support a finding that the building also served as, for example, a radio station, concert hall, or restaurant." *Id.*

The court found that under the second prong of *Jones* the church building had "direct, regular, and substantial use in activities affecting interstate commerce." The court therefore reversed the district court's order dismissing the indictment. *Rayborn*, 312 F.3d at 235. Judge Gilman concurred, but he said that many of the activities relied upon in the opinion were merely "passive [or] passing" activities that were insufficient to bring an arson case under Title 18 U.S.C. § 844(i). He found that the only factor which was relevant was:

> . . . the use of the church building to record sermons for the express purpose of broadcasting the sermons on commercial radio stations, including a radio station located in the state of Mississippi. Radio broadcasts, specifically targeted to reach people in other states represent, to my mind, classic activities affecting interstate commerce.

Rayborn, 312 F.3d at 236 (Gilman, J., concurring).

Although the Sixth Circuit had already ruled upon the issue, the petitioner again brought the interstate commerce question on appeal. In the section about the "Use of the Church in Interstate Commerce," the court said:

> At trial, the government presented a stipulation between the parties regarding the church's activities related to interstate commerce. Included among the stipulated facts was that the New Mount Sinai Missionary Baptist Church had approximately 6,000 members. Due to the church's location less than five miles from the Mississippi border and approximately fifteen miles from the border with Arkansas, the church's membership consisted of residents from all three states.
>
> The stipulation described that the church regularly broadcast its services on four radio stations airing in the three states. Paying for the radio broadcasts was a regular expense of the church, totaling over $15,000 in 1996, almost $17,000 in 1997, and

> approximately $12,000 in 1998. The New Mount Sinai Missionary Baptist Church maintained a tape room within the church building in which it stored all of the pastor's radio broadcasts.
>
> During one of those radio broadcasts, the church advertised a choir concert open to the public for which admittance was charged. In addition, the radio broadcasts regularly mentioned church-sponsered events that were free and open to the public, including buffet breakfasts every Sunday and regularly-sponsored church picnics.

United States v. Rayborn, 495 F.3d 328, 335 (6th Cir. 2007).

In rejecting the petitioner's claim, the Sixth Circuit stated that the evidence before the trial court was not "materially different" than that which was considered its prior opinion. The court referred specifically to "the church's regular use of radio broadcasts in Mississippi, Arkansas, and Tennessee as part of its evangelism, the church's membership consisting of residents of all three states, a gospel choir concert hosted at the church for which admission was charged, and the regularly-sponsored church events to which the general public was invited." The court said that the law-of-the-case doctrine prevented it from re-examining its prior opinion. *Rayborn*, 495 F.3d at 337.

The petitioner would respectfully submit that the "use" of the church building in this case was not the

active use for commercial purposes as required by *Jones*. *United States v. Gillespie*, *supra*, 452 F.3d at 1187, in analyzing the finding of several circuits on the issue of whether church buildings are actively used for commercial purposes, said that a church does not generally function in a manner which would show any significant relationship with interstate commerce. The Sixth Circuit, however, took the most normal of church functions and assigned a substantial use of interstate commerce to the same. Judge Gilman's concurring opinion that radio broadcasts of sermons are a "classic activities affecting interstate commerce" was made without even mentioning the commercial activity required by *Jones*. As Judge Donald said in her opinion dismissing the indictment, the radio broadcasts did not attempt to sell goods or services, but merely to broadcast sermons. If the receipt of donations from outs-of-state donors is simply a passing connection to interstate commerce, *Gillespie*, 452 F.3d at 1187, a non-commercial radio broadcast is likewise "passing." Gospel choirs are certainly part of the function of a church ministry. A single instance of charging admission to a gospel concert does not transform the church into a commercial enterprise. Donations and/or prices of admission are part and parcel of the described activities in the non-commercial enterprise of a church building.

The circuits have struggled with defining the limits *Jones* placed upon the use of Title 18 U.S.C. § 844(i). Although many circuits have found that churches do not generally function as commercial

enterprises, the Sixth Circuit held in this case that the most common functions of a church fit within such a category. The petitioner would therefore request that this Honorable Court grant this petition for certiorari in order to address the significant questions herein of federal jurisdiction and constitutional law.

ISSUE TWO:

Whether the evidence submitted at trial was sufficient to establish the petitioner's guilt beyond a reasonable doubt.

In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970), emphasizes the constitutional moorings of the requirement that a jury find beyond a reasonable doubt all elements of an offense for which a defendant is charged. The Court said that it is important to a free society that an individual "have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty." *Id.*, at 1073.

The statement of facts are cited both in the Sixth Circuit's opinion and this petition. The government's theory of the case, as summarized in the petitioner's motion for new trial in the district court, and which was confirmed in large part by Special Agent Teufert at trial, is that:

> . . . Rev. Rayborn climbed up a folding attic stairway (located in the ceiling of the tape room), entered the attic, walked across the

joists in the attic, poured a combination of gasoline and diesel fuel in the attic, lit those substances on fire in the attic, and then retraced his steps back through the attic and down the attic stairway to the tape room without being discovered, while the three women were planning the wedding just below and adjacent to the tape room. The government's theory also postulated that Rev. Rayborn poured diesel fuel on the carpeting in the tape room, gasoline on the carpeting in the secretary's office, diesel fuel in the hallway, and a combination of gasoline and diesel fuel in the pastor's office, all the while knowing full well that the women either were coming to the church or were in the church at the time. The government maintained this position even though the women did not smell any gasoline or diesel fuel, *and* even though the firemen did not smell any gasoline or diesel fuel, *and* even though Johnny Allen and Mr. Edward Whittington did not smell any gasoline or diesel fuel when they entered the premises.

Moreover, the government's theory postulated that Rev. Rayborn, knowing that people were present in the church, *and* knowing that a building contractor and his crew were present and working at the house located directly next door to the church *and* knowing that choir members would be arriving momentarily for choir practice at the church, *and* knowing that the fire station was located just down the street, *nevertheless*, lit the church on fire *during broad*

> *daylight*, boldly risking discovery, with the hope that the entire church would burn down *before* the fire could be discovered and extinguished by the firemen stationed a couple of hundred yards away.

In evaluating the sufficiency of the evidence, the appellate court will affirm the verdict "if the evidence, viewed in the light most favorable to the government, would allow a rational trier of the fact to find the defendant guilty beyond a reasonable doubt." *United States v. Tocco*, 200 F.3d 401, 424 (6th Cir. 2000). Under this standard, however, evidence "that at most establishes no more than a choice of reasonable probabilities cannot be said to be sufficiently substantial to sustain a criminal conviction upon appeal." *United States v. Jenkins*, 345 F.3d 928, 942 (6th Cir. 2003).

The petitioner submits that the government did not sustain its high burden of proof to convict the defendant of the charges in the indictment beyond a reasonable doubt. The jury necessarily was required to make a "leap of faith" to infer facts from the circumstantial evidence presented at the trial. For this reason, the petitioner respectfully requests that this Honorable Court would grant the petition for certiorari and dismiss the indictment against him.

ISSUE THREE:

Whether the district court committed error in allowing the government to present evidence of prior conduct of the defendant when such evidence was inadmissible under Rule 403 and/or Rule 404(b), Federal Rules of Evidence.

The Sixth Circuit held that the district court did not commit error in permitting the government to put on proof of the petitioner's personal expenditures as delineated in the statement of facts herein. The court said:

> Here, evidence of Rayborn's personal expenditures using church funds, the lavish pastoral facility within the church, and his use of the church's tax-exempt status for personal purposes was offered to show motive, which is an admissible purpose under Rule 404(b). And, of course, Rayborn's motivation as to why would set fire to the church was certainly at issue during the trial. The evidence offered was probative with regard to motive, as Rayborn's access to and control over church finances suggested that he would also have access to control over the money received from the insurance company even though he is not a named beneficiary.

Rayborn, 495 F.3d at 342-43. In finding that the district court properly applied Rule 403, Federal Rules of Evidence, the court said that the district court "carefully considered the probity and prejudicial value of each piece of evidence offered to show the defendant's control over the church finances, by no

means rubber-stamping all of the evidence the government sought to admit." *Id.*, at 343.

The petitioner would urge that the government's theory of motive is grossly speculative and not supported by any evidence at trial. The insurance policy issued to the church was a "valued policy" in accordance with T.C.A. § 56-7-801 and § 56-7-802. T.C.A. § 56-7-801 reads:

> § 56-7-801 *Policy exceeding value of property* Every agent, within ninety (90) days after making or writing any contract of fire insurance on any building or structure in this state, shall cause the building or structure to be personally inspected; and no company, and no officer or agent thereof, and no insurance broker, shall knowingly issue, negotiate, continue or renew any fire insurance policy upon property or interests therein with the state of an amount which, with any existing insurance thereon, exceeds the fair value of the property.

T.C.A. § 56-7-802 states that an insurer will be not required, upon a loss, to pay an amount higher than the actual value of the insured property. If the property owner has paid premiums for coverage higher than the actual value, he will be entitled to be reimbursed on a *pro rata* basis plus 6% from the date of issuance of the policy. The requirements of the statute are written into every policy of insurance issued in Tennessee. *Lassiter v. Equitable Fire and Marine Ins. Co.*, 483 S.W.2d 740, 746 (Tenn. App. 1972).

Under a valued policy, "the valuation fixed in the policy is conclusive since the claim is for a total loss." *Price v. Allstate Ins. Co.*, 614 S.W.2d 377, 379 (Tenn. App. 1981). The valued policy statute is remedial in nature and "was enacted primarily to protect the insured from being subjected to the insurer's argument that the building had been over insured and gives the insurer an incentive to inspect risks and assist insureds in establishing proper insurance evaluations." *Id.*, at 614 S.W.2d 381.

The government produced no evidence that the New Mount Sinai Missionary Baptist Church would not rebuild after the fire. During its direct examination of the witness Capehart, however, it insinuated that Rev. Rayborn would have access to all the funds from the policy which were not used in reconstruction. The valued policy was supposed to pay about $800,000, because the insurance company was required by Tennessee law to insure the church in an amount *not to exceed its actual value*. Neither the government nor the Sixth Circuit gave even a hint why the church would not use most, if not all, of the insurance proceeds to rebuild a facility similar to what it had before. By placing a fixed amount of loss on the actual value of real property, the Tennessee valued policy statute prevents an insurance company from charging a premium for coverage in excess of the property value. Likewise, the insured cannot reap a windfall by receiving insurance proceeds in excess of the actual value.

The evidence suggested that if, in fact, the defendant was receiving personal gain at the church's expense, and had been doing so for years, he would have no motive whatsoever to burn the church from which he received these benefits. Although the church would have received about $800,000 from the insurance company, common sense would suggest that the money would have to be used to rebuild the church. Because of the valued policy, it can safely be presumed that the cost of rebuilding would require most, if not all, of these proceeds. There was no evidence to the contrary submitted at trial.

Old Chief v. United States, 519 U.S. 152, 117 S.Ct. 644 (1997), states that the "unfair prejudice" contemplated by Rule 403:

> speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged. . . . So the Committee Notes of Rule 403 explain, "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one . . . "

Old Chief, 117 S.Ct. at 650 (citation omitted). *See United States v. Wesley*, 417 F.3d 612, 621-22 (6th Cir. 2005) (unfair prejudice "does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence rather, it refers to evidence which tends to suggest decision on an improper basis."). (citation omitted). Quoting

then-Judge Breyer in *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982), *Old Chief* said:

> Although . . . "propensity evidence" is relevant, the risk that a jury will convict for crimes other than those charged – or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment – creates a prejudicial effect that outweighs ordinary relevance."

Old Chief, 117 S.Ct. at 650. The risk of unfair prejudice to the defendant will vary with each case, "but will be substantial whenever the official record offered by the Government would be arresting enough to lure a juror into a sequence of bad character reasoning." *Id.*

United States v. Merriweather, 78 F.3d 1070 (6th Cir. 1996), citing *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239 (1946), said that in its determination of whether the improper admission of error is harmless, it must examine what the error meant to the jury in relation to all else that happened in the trial. The error in *Merriweather* was not harmless because the court was unable to say "with fair assurance" that the jury's verdict "was not substantially swayed" by the improperly admitted Rule 404(b) evidence.

The petitioner would argue that this petition presents substantial issues as the proper interpretation and application of Rules 403 and 404(b). He

would therefore pray that his petition for writ of certiorari be granted on this issue.

CONCLUSION

For the aforementioned reasons, pursuant to Rule 10.1, Rules of the Supreme Court, the petitioner, Gerald Rayborn, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

This the 23rd day of October, 2007.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GERALD RAYBORN,
Defendant-Appellant.

No. 05-6894

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 99-20288 – Bernice B. Donald, District Judge.

Argued: April 17, 2007

Decided and Filed: July 26, 2007

Before: MARTIN and DAUGHTREY, Circuit Judges;
SCHWARZER, District Judge.*

COUNSEL

ARGUED: K. Jayaraman, Law Office of K. Jayaraman, Memphis, Tennessee, for Appellant. Frederick H. Godwin, Assistant United States Attorney, Memphis, Tennessee, for Appellee. **ON BRIEF:** K. Jayaraman, Law Office of K. Jayaraman, Memphis, Tennessee, for Appellant. Frederick H. Godwin,

* The Honorable William W Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

Assistant United States Attorney, Memphis, Tennessee, for Appellee.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. On August 25, 1998, the New Mount Sinai Missionary Baptist Church in Memphis, Tennessee, was destroyed by a fire. The church's fiery pastor, Reverend Gerald Rayborn, was convicted of arson and mail fraud under 18 U.S.C. §§ 844(i) and 1341, respectively, for setting his church on fire and attempting to collect money from the church's insurance company after the fire. On appeal, Rayborn raises four challenges. First, he contends that his church was not sufficiently involved in interstate commerce to trigger the federal arson statute. Second, he claims that the evidence presented at trial was insufficient to establish guilt beyond a reasonable doubt on all charges. Third, Rayborn argues that evidence of his access to and control of church finances was inadmissible under Federal Rule of Evidence 404(b), and therefore, the district court erred in allowing this evidence to be presented at trial. Finally, he challenges a particular rebuttal witness whom the government called to testify at trial. For the reasons outlined below, Rayborn's convictions are **AFFIRMED**.

I.

A. Procedural Background Leading up to Second Trial

The New Mount Sinai Missionary Baptist Church in Memphis, Tennessee was destroyed by fire on August 25, 1998. On December 16, 1999, the church's pastor, defendant Reverend Gerald Rayborn, was indicted on one count of arson in violation of 18 U.S.C. § 844(i) and two counts of mail fraud in violation of 18 U.S.C. § 1341, based on an alleged attempt to collect money from the church's insurer after setting the church on fire. Rayborn entered a plea of not guilty and filed a motion to dismiss the indictment for failure to allege a crime, which the district court denied. Rayborn then filed a motion to reconsider. On August 25, 2000, the district court granted the motion and dismissed the charge of arson, concluding that his prosecution under the federal arson statute represented an unconstitutional extension of Congress's commerce power because the government failed to establish that the church was sufficiently related to interstate commerce, as required by the statute. Believing it lacked subject matter jurisdiction, the district court dismissed the arson charge.

On appeal, a panel of this Court reversed and remanded. First, the panel held that the district court erroneously concluded that the interstate commerce requirement in § 844(i) affected subject matter jurisdiction. *United States v. Rayborn,* 312 F.3d 229, 231 (6th Cir. 2002). Second, instead of merely vacating

the dismissal order, the panel examined the merits of the interstate commerce question and held that the district court ruled incorrectly. *See id.* at 232-35. Emphasizing facts such as the church's use of paid radio broadcasts as a regular part of its evangelism and its membership consisting of residents of three states, the panel held that "the government has provided sufficient evidence to permit a rational jury to find that the church was actively employed in commercial activities with an effect on interstate commerce." *Id.* at 235.

Rayborn's case was remanded to the district court, and Rayborn's first jury trial began on July 14, 2003. On July 28, 2003, the court declared a mistrial pursuant to the jury's announcement that it was unable to reach a verdict. Rayborn's second trial began on August 10, 2004.

B. Facts Established at the Second Trial

1. The Fire

In the late afternoon of August 25, 1998, Trashonda Brown, Vatonia Gray, and Carolyn Woodard met at Woodard's house to discuss Brown's upcoming wedding, which was to take place at the New Mount Sinai Missionary Baptist Church. Gray called the church from Woodard's house and obtained permission from Rayborn to visit the church later that afternoon. Upon their arrival twenty to twenty-five minutes later, the women, finding the church's front door unlocked, entered and began looking

around. Within about ten minutes, Rayborn appeared and introduced himself as the pastor. After a short conversation, he left the women alone in the church sanctuary. Shortly before 6:00 p.m., Gray realized that she would be late to pick up her son at football practice and called a friend to ask for assistance. Cell phone records that were introduced at trial showed this phone call occurring at 5:52 p.m.

Five or ten minutes later, the church lights flickered and then went out. The women heard a noise, described as "a loud boom," and Gray smelled smoke. The three women walked south toward the back of the church, where the pastor's office, secretary's office, tape room, and pastoral facility were located. (The pastoral facility was a small apartment-like area in the back of the church that included a bedroom, a hot tub, and showers.) They knocked on the door to the pastor's office to see if Rayborn was aware of what was going on, but they received no response. From underneath the door to the secretary's office, the women observed smoke and a "glow" or "colors." They immediately left the church and called 911.

Johnny Allen, a construction worker, testified that he was performing work outside the church on the day of the fire. According to Allen, when the three women exited the church saying that they smelled smoke, he entered the church to investigate. Allen reported that he walked directly to the kitchen in the pastoral facility. Although he did not observe a fire at this time, he looked up into a vent in the kitchen and

saw "redness." On cross-examination, Allen reported that the "redness" looked "like an electrical box or something just red, red, red." The government called Michael McGuire, an expert in electrical engineering and electrical fire investigations, as a rebuttal witness. McGuire testified that the National Electrical Code would not permit an electrical box to be located inside a vent where it could be seen from underneath.

When Rayborn took the stand, he testified that he left the church at approximately 5:30 p.m., after discussing wedding plans with the women. While on his way home, he stopped briefly to talk with Allen, who was working on the house Rayborn owned adjacent to the church. Following this conversation, Rayborn returned to the church to retrieve a document for Allen. This document contained the church's tax identification number, which Allen could use to get a discount on the construction materials.

Rayborn's mother-in-law, Lovenuia Banks, testified that on the day of the fire she was at Rayborn's house watching her grandchild. According to Banks, Rayborn returned home from the church and took a nap on the family's couch. When a neighbor informed Rayborn that the church was on fire, he rushed to the church. Edward Willingham, who lived in the house owned by Rayborn adjacent to the church, testified that he hurried to the church when Allen informed him and his wife of the fire. Soon after he arrived at the church, he saw Rayborn drive up and unlock the church's back door. According to Willingham's testimony, Rayborn asked him to retrieve a briefcase from

the pastor's office, while Rayborn attempted to secure items from the church's garage, including a recreational vehicle. Rayborn's daughter and son-in-law also testified that Rayborn and others helped remove vehicles and other items from the church garage. The son-in-law indicated that he moved a motorcycle and helped Rayborn's wife move a full five-gallon can of diesel fuel.

Memphis firefighter Gregory Henderson also testified. According to Henderson, a civilian drove up to the Horn Lake fire station shortly after 6:00 p.m. to inform the firefighters that the church was on fire. Henderson notified the dispatch office and the firefighters responded in approximately one minute, as the church was located only a couple of blocks away from the fire station. When the firefighters arrived at the scene, Henderson observed a fire involving 40 to 60 percent of the church, with flames coming through the roof of the south end. Henderson asked Allen to lead him to the location within the church where he believed the fire started. As the two men walked from the front of the church toward the rear, the only indication of fire was a light haze of smoke near the ceiling and some electrical sparks falling to the ground. According to Henderson, the air was clear enough that he did not need to use his oxygen tank. Allen led him to the area where the smoke was, then pushed aside a ceiling tile with a broomstick, and the two men observed a fire burning in the attic overhead. Henderson and Allen then exited the building.

Memphis firefighter Steven Seward also testified. Seward entered the building as Henderson was exiting to try to determine the fire's origin. Like Henderson, Seward observed fire in the attic area then exited the building.

According to Henderson and Seward, they unraveled a hose line in order to fight the fire from within the church. However, once the hose was ready and the firefighters reentered the building, the fire had become much worse. Seward testified that "there was a pretty dramatic change and we knew we didn't have much time. . . . it was a surprise to me, I fought a lot of fire but this one turned bad quick." Both men testified that the firefighters were soon ordered to exit the building because it was determined that the fire was too dangerous to continue fighting from inside.

2. Fire Investigation

The next morning, fire investigators from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) arrived at the scene to investigate the fire's cause and origin. According to Mark Teufert, a special agent certified fire investigator with the ATF, the team of investigators interviewed responding firefighters, Rayborn, and witnesses. They conducted a detailed observation of the scene, which included taking photographs and collecting evidence from the fire debris.

ATF criminal investigator Walter Hoback interviewed Rayborn, asking him a variety of questions about the church, his relationship with the church, and his activities the day of the fire. According to Hoback's testimony, Rayborn indicated that the New Mount Sinai Missionary Baptist Church was a fast-growing church, but prior to the fire, there had been no established plans to build an addition or a new church. When Hoback asked who had access to the church's funds, Rayborn explained that he not only had access, but had authority to write checks without the need for a cosigner.

Rayborn told Hoback that he was alone in the church on the day of the fire until the three women arrived at about 5:15 p.m. Rayborn indicated that the church's exterior doors were locked all day until he opened the front door for the women at around 5:00 p.m. In addition, Rayborn told Hoback that he and his wife were the only people with keys to the pastor's office, and that no flammable liquids were stored in the pastor's office, the secretary's office, or the tape room.

Cause and origin investigator Danny Benton testified that he walked through the scene with a K-9 dog that was trained to alert to the presence of fire accelerants, including gasoline, diesel fuel, lighter fluid, and paint thinners. According to Benton, during their tour of the church premises, when the K-9 alerted, Benton marked the location, and another investigator collected the relevant sample of fire debris for testing.

Fire investigator Ranold Jeffrey Williams described collecting the samples after the dog alerted, as well as collecting other debris samples during the investigation. Williams established a chain of custody, explaining that he put stickers on the samples to indicate where they had been found, stored the samples in the evidence room at the Memphis Fire Department, and then delivered them to the toxicology laboratory at the University of Tennessee.

David Stafford, director of the forensic toxicology laboratory and a professor in the pathology department at the University of Tennessee, analyzed the samples with the aid of a gas chromatograph. At trial, Stafford was certified as an expert in analytic and forensic chemistry, specifically the analysis of fire debris. Stafford testified that fourteen of the twenty-three samples collected at the scene tested positive for the presence of accelerant: three samples contained gasoline residue, seven samples contained diesel fuel or fuel oil residues, and four samples contained both gasoline residue and diesel fuel or fuel oil residues.

Teufert was certified as an expert in investigating and determining the cause and origin of fire. Teufert testified that he had previously encountered the presence of gasoline and diesel fuel in set fires. According to Teufert, gasoline is a dangerous and volatile product because it has a low ignition temperature and vaporizes very quickly. Diesel fuel, on the other hand, has a higher ignition temperature and is much more stable. Teufert explained that

arsonists tend to combine the two accelerants to produce a substance with the volatility of gasoline and the relative stability of diesel fuel.

In addition to collecting samples with the assistance of the K-9, ATF investigators conducted a very detailed observation of the church premises in an attempt to determine the cause and origin of the fire. Teufert explained that once the debris from the fire was cleared enough to examine the condition of the floor, investigators found flammable liquid pour patterns on the floors of the secretary's office, pastor's office, and tape room. According to Teufert, a flammable liquid pour pattern typically results when flammable liquid is poured on carpeting then ignited; the carpeting and the backing absorb the flammable liquid and produce an extreme amount of heat when ignited, burning until the flammable liquid is entirely consumed. Teufert testified that fire investigators consider a flammable liquid pour pattern to indicate a set fire, unless flammable liquids are stored in the area of the fire's origin. Here, however, Rayborn had told Hoback that no flammable liquids were stored in the pastor's office, the secretary's office, or the tape room.

During their sweep of the church premises, the investigators found church offering envelopes twisted around an appliance cord inside the access panel of a freezer located in the church garage. According to Teufert, arsonists commonly use paper as an accelerant, igniting the paper to damage the appliance cord,

which results in the interior of the appliance appearing as if there was an electrical failure.

After close examination of the church premises, ATF investigators ruled out all causes of the fire other than arson. Teufert testified that they determined the fire did not have an electrical cause after examining every appliance in the area of the fire's origin, including the church's electrical system and thirteen heating, ventilation, and air-conditioning units. Teufert told the jury that in his opinion, someone poured gasoline, diesel fuel, or both in the pastor's office, secretary's office, and tape room, and also ignited a fire in the southwest corner of the attic. In addition, Brian Hoback, an ATF investigator specializing in fires related to explosions and an expert in the cause and origin of fire investigation, testified that he inspected the gas lines and determined that the fire was not caused by a natural gas explosion.

3. Dealings with the Insurance Company

At trial, two employees from Grange Mutual Casualty Company (Grange), the church's insurer, testified to the insurance claim filed by Rayborn after the fire. Ronald Capeheart, an employee in the claims department, described inspecting the church premises after the fire and determining it to be "an obvious total loss." According to Capeheart, the church's insurance policy entitled it to receive $778,752 plus an automatic four percent increase with no requirement to rebuild.

Matthew Gray, supervisor of the special investigation unit at Grange, testified that he was involved in investigating the facts and circumstances surrounding Rayborn's claim. On August 28, 1998, Gray met with Rayborn and asked a variety of questions regarding the church and Rayborn's activities on the day of the fire. According to Gray's testimony, Rayborn informed him that he was alone in the church on the day of the fire until approximately 5:00 p.m. He told Gray that he always kept the doors to the church locked, even when he was there; on the day of the fire, all doors were locked except the front door, which he opened for the three women. Although both Rayborn and his wife had keys to the pastor's office, Rayborn indicated that only he had a key to the pastoral facility, and he maintained the three remote controls for the church garage doors. Finally, when Gray asked Rayborn about the presence of flammable liquids in the church on the day of the fire, Rayborn told him about a can of diesel fuel and two bottles of charcoal lighter fluid located in the garage.

Gray testified that the claims process required Rayborn to complete a sworn statement and proof of loss. According to Gray, this form is essentially a formal demand upon an insurance company for payment of a claim. Gray testified to mailing Rayborn a blank sworn statement and proof of loss along with a postage-paid envelope in which to return the completed form to the insurance company. Grange received Rayborn's completed form on October 23, 1998, in the postage-paid envelope. The form was signed by

Rayborn in the presence of a notary public and indicated that the total amount of the claim was $792,257.70.

4. Use of the Church in Interstate Commerce

At trial, the government presented a stipulation between the parties regarding the church's activities related to interstate commerce. Included among the stipulated facts was that the New Mount Sinai Missionary Baptist Church had approximately 6,000 members. Due to the church's location less than five miles from the Mississippi border and approximately fifteen miles from the border with Arkansas, the church's membership consisted of residents from all three states.

The stipulation described that the church regularly broadcast its services on four radio stations airing in the three states. Paying for the radio broadcasts was a regular expense of the church, totaling over $15,000 in 1996, almost $17,000 in 1997, and approximately $12,000 in 1998. The New Mount Sinai Missionary Baptist Church maintained a tape room within the church building in which it stored all of the pastor's radio broadcasts.

During one of these radio broadcasts, the church advertised a choir concert open to the public for which admittance was charged. In addition, the radio broadcasts regularly mentioned church-sponsored events that were free and open to the public, including buffet

breakfasts every Sunday and regularly-sponsored church picnics.

5. Church Finances

At trial, the government presented testimony from two members of the church's Board of Trustees, Jacqueline Ford and Mattie Stewart. At the time of the trial, Ford had been a trustee for eight or nine years, while Stewart had served on the Board for twenty-one years. In addition to being a trustee, Ford testified to serving as the church's secretary, which included mostly financial responsibilities such as paying church bills and balancing the church's checkbook.

Both Ford and Stewart testified that Rayborn had power of attorney such that he could write checks on the church's bank account without a cosigner. Ford and Stewart were the only other people authorized to sign church checks, but each needed a cosigner. Through Ford, the government presented a number of checks written by Rayborn on the church's bank account between 1996 and the time of the fire. Some of the checks were written to "cash," some were written to "Gerald Rayborn," and others were written to pay personal expenses like Rayborn's credit card bills.

The church paid Rayborn a weekly salary of $500 in cash, and Ford testified that none of the checks were for his salary. Rayborn testified that he did not have a personal bank account prior to the fire, but

indicated that he would pay the church back whenever he used church funds to pay for personal expenses.

Ford and Stewart testified that the Board of Trustees authorized various expenditures on Rayborn's behalf. The church bought multiple vehicles for Rayborn, including a Corvette and the recreational vehicle. The trustees authorized the construction of the pastoral facility – the small apartment-like area that included a bedroom, a hot tub, and showers. Ford and Stewart testified that Rayborn had the authority to make these expenditures, and Stewart said no member of the Board of Trustees or the congregation ever complained about his expenditures or his use of church funds.

Despite the government's intention to introduce more evidence of Rayborn's access to and control over church funds, Rayborn succeeded in excluding some of this evidence through motions *in limine* during both trials.

C. Verdict and Sentencing

On August 20, 2004, after the conclusion of Rayborn's second jury trial, the jury returned a guilty verdict on all three counts of the indictment.[1]

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[1] The first mail fraud count referred to Rayborn's causing Grange to mail him a blank Sworn Statement In Proof of Loss. The second mail fraud count referred to Rayborn's mailing of the completed Sworn Statement In Proof of Loss back to Grange.

Rayborn moved for a new trial on August 26, 2004, which was denied. On April 13, 2005, the district court sentenced Rayborn to 60 months' imprisonment, to be followed by two years' supervised release. The judgment was amended on December 8, 2005, to provide that four and one-half months of Rayborn's sentence is to run concurrently with a sentence imposed in an earlier case.[2] Rayborn brought this timely appeal.

II.

A. Interstate Commerce Element of Arson Statute

On appeal, Rayborn argues that his prosecution and conviction for arson under 18 U.S.C. § 844(i) was an unconstitutional exercise of Congress's commerce power. Specifically, Rayborn argues that the evidence in this case fails to establish that the New Mount Sinai Missionary Baptist Church was sufficiently used in interstate commerce. This argument is not well-taken.

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[2] In another case brought against Rayborn, he was found guilty of one count of conspiracy to commit mail fraud, wire fraud, and money laundering under 18 U.S.C. §371, two counts of aiding and abetting mail fraud under 18 U.S.C. §§ 1341 and 2, and one count of money laundering under 18 U.S.C. § 1957. Rayborn was sentenced to 9 months' imprisonment. His convictions were affirmed by this Court in *United States v. Rayborn*, No. 05-6742, 2007 U.S. App. LEXIS 15742 (6th Cir. July 2, 2007).

A previous Sixth Circuit panel concluded that based on the facts alleged in the indictment and stipulated to by the parties, there was sufficient evidence of the church's interstate commerce activity, and therefore, Rayborn's prosecution under this statute could go forward. *See Rayborn,* 312 F.3d at 235. Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Westside Mothers v. Olszewski,* 454 F.3d 532, 538 (6th Cir. 2006) (quoting *Arizona v. California,* 460 U.S. 605, 618 (1983)). The doctrine precludes reconsideration of issues "decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition." *Id.* (quoting *Coal Res., Inc. v. Gulf & Western Indus., Inc.,* 865 F.2d 761, 766 (6th Cir. 1989)). The law of the case doctrine "is 'directed to a court's common sense' and is not an 'inexorable command.'" *Hanover Ins. Co. v. Am. Eng'g Co.,* 105 F.3d 306, 312 (6th Cir. 1997) (quoting *Petition of U.S. Steel Corp.,* 479 F.2d 489, 494 (6th Cir. 1973)). There are three exceptional circumstances under which a court will reconsider a previously decided issue: "(1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice." *Westside Mothers,* 454 F.3d at 538.

None of these exceptional circumstances is present here. First, the evidence before the district court

regarding the church's interstate commerce activities is not materially different from the evidence considered by the previous Sixth Circuit panel. Both the previous opinion and the parties' stipulation at trial emphasize the church's regular use of radio broadcasts in Mississippi, Arkansas, and Tennessee as part of its evangelism, the church's membership consisting of residents of all three states, a gospel choir concert hosted at the church for which admission was charged, and the regularly-sponsored church events to which the general public was invited. *See Rayborn,* 312 F.3d at 234-35. In addition, no contrary view of the law has been decided by the Sixth Circuit or the Supreme Court, and no legislation has amended the federal arson statute. Finally, the previous panel's decision cannot be described as "clearly erroneous" such that it would require reconsideration.

In sum, because the same evidence that was before the prior panel was presented at trial, and no other exceptional circumstances exist, the law of the case doctrine bars us from reexamining the interstate commerce element of the federal arson statute. We hold that there exists sufficient evidence of the church's effect on interstate commerce.

B. Sufficiency of the Evidence

Rayborn next challenges the sufficiency of the evidence underlying his convictions for arson and mail fraud under 18 U.S.C. §§ 844(i) and 1341, respectively. "The standard for evaluating claims that a

conviction is not supported by sufficient evidence presents a very difficult hurdle for the criminal appellant. . . ." *United States v. Winkle,* 477 F.3d 407, 413 (6th Cir. 2007) (quoting *United States v. Maxwell,* 160 F.3d 1071, 1077 (6th Cir. 1998)). In analyzing this claim, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979) (emphasis in original). Under this standard, "[w]e 'view both circumstantial and direct evidence in a light most favorable to the prosecution,' and 'we draw all available inferences and resolve all issues of credibility in favor of the [factfinder's] verdict.'" *United States v. Wade,* 318 F.3d 698, 701 (6th Cir. 2003) (alteration in original) (quoting *United States v. Humphrey,* 279 F.3d 372, 378 (6th Cir. 2002) and *United States v. Salgado,* 250 F.3d 438, 446 (6th Cir. 2001), respectively). Because the factual bases for the two counts are closely related, we discuss them together.

Pursuant to the federal arson statute,

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years

> and not more than 20 years, fined under this title, or both.

18 U.S.C. § 844(i). As explained above, the interstate commerce element of the arson statute is satisfied. Further, Ronald Capeheart testified at trial that the church was "an obvious total loss" as a result of the fire. Therefore, the only issue here is whether Rayborn maliciously destroyed the church by fire.

In order to support a conviction under the federal mail fraud statute, the government must prove beyond a reasonable doubt: "(1) a scheme or artifice to defraud; (2) use of mails in furtherance of the scheme; and (3) intent to deprive a victim of money or property." *United States v. Turner,* 465 F.3d 667, 680 (6th Cir. 2006). "The government need only charge that the defendant intended to defraud the victim of money or property, not that the victim was actually deprived of money or property." *United States v. Ames Sintering Co.,* 927 F.2d 232, 235 (6th Cir. 1990), *quoted in Turner,* 465 F.3d at 681. At trial, various witnesses established the second element of the mail fraud statute for both counts by testifying that Rayborn's insurance claim induced Grange to mail him a blank sworn statement and proof of loss on August 31, 1998, and that Rayborn mailed the completed form on October 23, 1998. The first and third elements are related, as the government theorized that Rayborn intentionally set fire to the church in order to collect nearly $800,000 in insurance proceeds.

As Rayborn accurately points out in his brief, there is no direct evidence that he intentionally set fire to the church. However, "circumstantial evidence alone, if substantial and competent, may support a verdict and need not remove every reasonable hypothesis except that of guilt." *McKenzie v. Smith,* 326 F.3d 721, 727 (6th Cir. 2003) (quoting *United States v. Talley,* 194 F.3d 758, 765 (6th Cir. 1999)). Indeed, even "specific intent to defraud may be established by circumstantial evidence and by inferences drawn from examining the scheme itself which demonstrate that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension." *Winkle,* 477 F.3d at 413 (quoting *United States v. Yoon,* 128 F.3d 515, 523-24 (7th Cir. 1997)).

Rayborn argues that the circumstantial evidence presented at trial is "too ambiguous and tenuous" to sustain his convictions, and contends that it falls on the wrong side of the "line . . . drawn between valid circumstantial evidence, and evidence which requires a leap of faith in order to support a conviction." Appellant's Br. at 42-43 (quoting *United States v. White,* 932 F.2d 588, 590 (6th Cir. 1991)). But unlike *White,* where this Court found no evidence to support an inference of possession or intent to manufacture or distribute marijuana necessary to sustain the defendant's conviction for possession with intent to distribute, in the instant case, there was sufficient evidence for a jury to conclude that the fire at the church had been intentionally set, that Rayborn was the person

who set the fire, and that he intended to defraud the insurance company and had a scheme to do so.

At trial, two ATF fire investigators testified that the church fire had been intentionally set. The ATF investigation included a detailed examination of the scene and interviews conducted with various people, including the three women planning the wedding, responding firefighters, and Rayborn. The investigation not only ruled out accidental causes of the fire, such as a natural gas explosion and an electrical fire, but also yielded affirmative evidence of arson. Fourteen of the twenty-three samples collected from the fire debris tested positive for gasoline, diesel fuel, or both, and ATF investigator Mark Teufert testified that arsonists tend to mix the two to produce a volatile yet stable accelerant. Even though Rayborn reported that no flammable liquids were stored in the pastor's office, secretary's office, or tape room, investigators discovered flammable liquid pour patterns in each room. Also, inside a freezer in the church garage, investigators found charred church offering envelopes wrapped around an appliance cord, a ruse commonly used by arsonists to make the appliance appear to have experienced electrical failure. Based on this evidence, Teufert theorized that someone poured gasoline, diesel fuel, or both in the pastor's office, secretary's office, and tape room, and also ignited a fire in the southwest corner of the attic.

Rayborn presented evidence that he claims cast doubt on the ATF investigators' conclusion that the fire was intentionally set. Two expert witnesses,

Wolfgang Bertsch and Darlene Loprete, testified that David Stafford at the University of Tennessee forensic laboratory analyzed the samples incorrectly, suggesting that he should have used a mass spectrometer in addition to the gas chromatograph. Both witnesses also testified that they believed Stafford erroneously concluded that gasoline and diesel fuel were present in the samples. Loprete indicated that Stafford's results might have been caused by the presence of two substances in the samples: Tampro roofing adhesive, which was used when the church's roof was replaced in 1994, and Goof Off, a product used to remove gum or adhesive that was stored in the church's attic prior to the fire. Despite this testimony, Rayborn presented no expert testimony indicating a cause and origin of the fire different from the ATF agents' conclusion of arson. Therefore, viewing the evidence in the light most favorable to the government, a rational juror could conclude that the fire that destroyed the New Mount Sinai Missionary Baptist Church was set intentionally.

In addition, Rayborn himself told both ATF investigator Walter Hoback and insurance investigator Gray that he was the only person present in the church the entire day of the fire until approximately 5:00 p.m. Rayborn told the investigators that prior to this time, all exterior doors to the church were locked, as he regularly kept the church doors locked even when he was there. Thus, in the defendant's own words, he was the only person with the ability to start a fire from the inside the church.

Finally, Rayborn's fraudulent scheme and intent to defraud can be inferred from his setting the fire and then filing an insurance claim. The church had almost $800,000 worth of insurance. Although the church was the named beneficiary of the insurance policy, the evidence showed that Rayborn had access to and control over church funds such that he would have access to any insurance money collected. Viewing the evidence in the light most favorable to the government, a rational trier of fact could conclude that the government presented sufficient evidence of a scheme to deceive the insurance company and the requisite intent to defraud.

Therefore, we hold that sufficient evidence exists to support Rayborn's convictions for arson and mail fraud under 18 U.S.C. §§ 844(i) and 1341.

C. Admissibility of Evidence of Rayborn's Access to and Control over Church Finances

In his third issue on appeal, Rayborn argues that the district court erroneously allowed the government to present evidence of his prior conduct relating to church finances, claiming that such evidence was inadmissible under Federal Rule of Evidence Rule 404(b). Specifically, Rayborn disputes evidence introduced to show his access to and control over church finances, including specific transactions he made from the church bank account, evidence that he placed a king-sized bed, a hot tub, showers, and a kitchen in the pastoral facility located inside the

church, and evidence that he used the church's tax-exempt status for personal purposes. In response, the government argues that this is not Rule 404(b) evidence, but that Rule 404(b) notice was only given in an abundance of caution. Rather, the government maintains that this is *res gestae* proof that is "inextricably intertwined" with the crimes charged.

The district court made the following rulings on the admissibility of evidence pertaining to Rayborn's access and control over church finances. Before Rayborn's first jury trial began, the government gave notice that it intended to present evidence of a sexual relationship between Rayborn and a church member, including evidence that Rayborn used church funds to make multiple $2,000 payments to the woman. The defense filed a motion *in limine* requesting that the government be barred from introducing any of this evidence. In response, the government argued that the evidence was "'inextricably intertwined' to prove the defendant's motive to obtain $792,000 in insurance proceeds and his access and control of the $792,000 once deposited into church's bank account." On June 25, 2003, the district court granted Rayborn's motion, finding that the evidence's probative value was substantially outweighed by the danger of unfair prejudice.

On June 27, 2003, the government submitted a notice of potential Rule 404(b) evidence, indicating that it intended to call auditor Lisa Foster to testify to Rayborn's personal use of the church bank account, listing nine types of such personal expenditures,

including car payments, car insurance, credit cards, income tax, as well as checks signed by the defendant and made out to "cash" or to "Gerald Rayborn." According to the government, these expenditures were "'inextricably intertwined' to prove Rayborn's control and manipulation of the church bank account for his personal and financial gain." In response, the defense filed its second motion *in limine,* arguing that these specific expenditures had no probative value. The motion also noted Rayborn's concern that the prosecution would raise evidence of an alleged romantic relationship between Rayborn and a church member, despite the court's ruling on the first motion *in limine.* Just prior to the first jury trial, the district court issued an oral order granting in part and denying in part the defense's second motion *in limine.* The court denied the motion as to evidence of Rayborn's personal expenditures made from the church bank account during the years 1996 and 1997, stating: "[t]he government seeks to show that he had unfettered control [and] dominion over those charges and in order to show motive it is important for the government to be able to show those things." However, the district court granted the motion as to Rayborn's romantic relationship, reiterating "there will be no testimony about romantic relationship, mistresses, et cetera."

Before Rayborn's second jury trial began, he submitted a third motion *in limine,* asking the court for "an order barring the government from introducing or presenting at trial any testimony of

the government's auditor, Lisa Foster (and other potential witnesses), concerning the church's purchase of vehicles and other such specific expenditures for the benefit of Reverend Gerald Rayborn." According to the defense, even though this evidence had been admitted during the first trial, the government should not be permitted to present it again, because Rayborn's dominion and control over church funds was not disputed. The motion also argued that the evidence was inadmissible under Federal Rule of Evidence 403, because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. In response, the government argued that in order to show the jury that Rayborn stood to benefit from the church's insurance policy even though he was not a named beneficiary, the government wanted to show that he "benefited from the church proceeds previously and how he abused the church proceeds for his own personal benefit and gain." The district court granted Rayborn's motion, stating that "this evidence goes more to bolster the fact or to taint the fact that this was a person misusing the church." However, the district court ruled very narrowly, prohibiting only a financial analysis of the defendant's checks through the testimony of Lisa Foster and excluding evidence of a car that Rayborn allegedly purchased for a mistress. The district court explained: "I'm not stripping the government of the ability to get into that there

might have been some personal use through other avenues where it came in [before], I'm not."

During trial, this issue arose again just before the government called Jacqueline Ford to the witness stand, when the defense objected in advance to her testifying to church expenditures and evidence of automobiles purchased for Rayborn in 1995 and 1996. Noting the defendant's objection for the record, the court permitted the testimony as covered by its broad ruling on the motion *in limine*.

Ford and Stewart testified to the church's finances. They explained that Rayborn had power of attorney such that he could write checks on the church's bank account without a cosigner. Through Ford, the government presented a number of checks written by Rayborn on the church's bank account between 1996 and the time of the fire. Some of these checks were made out to "cash"; some were written to "Gerald Rayborn"; others were used to pay Rayborn's personal expenses, such as credit card bills, car payments, car repairs, and income taxes. Ford testified that Rayborn was paid a weekly salary of $500 in cash, and none of these checks was for his salary. Ford and Stewart also testified to expenditures authorized by the Board of Trustees and the congregation for Rayborn's benefit, including the purchase of multiple vehicles and the construction of a pastoral facility within the church building. Ford and Stewart indicated that Rayborn had the authority to make these expenditures and that no one ever complained about the way the church was run.

In addition to arguing that evidence of these expenditures was improperly admitted, Rayborn also claims that the district court should not have allowed the government to present evidence that he used the church's tax-exempt status for personal purposes, namely, for construction on his adjacent personal property. In response to the government's notice of potential Rule 404(b) evidence, Rayborn filed a motion *in limine,* arguing that evidence he used the church's tax-exempt status for personal purposes should be excluded as lacking probative value. The district court agreed to exclude the tax form during the first trial. However, during Rayborn's second trial, the prosecutor asked Rayborn during cross-examination about the tax-exempt form in connection with his exit and return to the church building on the day of the fire. Although the defense raised no objection at the time, the following day, Rayborn's attorney objected to any further discussion of his use of the church's tax-exempt status for personal purposes. In response, the district judge did not address the objection regarding future testimony but said that she would let the previous testimony stand.

We hold that the district did not err in admitting the evidence discussed above. However, we will not address the government's argument that the *res gestae* exception applies, for we find that the evidence is properly admissible under Rule 404(b), which states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a

> person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

A three-part test set out in *United States v. Merriweather* is used to review the admissibility of evidence under Rule 404(b):

> [W]e first review for clear error the district court's factual determination that the 'other . . . acts' occurred. Second, we examine *de novo* the district court's legal determination that the evidence was admissible for a legitimate purpose. Finally, we review for abuse of discretion the district court's determination that the probative value of the other acts evidence is not substantially outweighed by its unfairly prejudicial effect.

78 F.3d 1070, 1074 (6th Cir. 1996).

With regard to the first factor, there was no dispute that the other acts at issue here did, in fact, occur. As for the second factor, we must determine whether the other acts evidence was admitted for a legitimate purpose, and not "to prove the character of

a person in order to show action in conformity therewith."

> Evidence of other acts is probative of a material issue other than character if (1) the evidence is offered for an admissible purpose, (2) the purpose for which the evidence is offered is material or 'in issue,' and (3) the evidence is probative with regard to the purpose for which it is offered.

United States v. Jenkins, 345 F.3d 928, 937 (6th Cir. 2003) (quoting *United States v. Haywood,* 280 F.3d 715, 720 (6th Cir. 2002)). Here, evidence of Rayborn's personal expenditures using church funds, the lavish pastoral facility within the church, and his use of the church's tax-exempt status for personal purposes was offered to show motive, which is an admissible purpose under Rule 404(b). And of course, Rayborn's motivation as to why he would set fire to the church was certainly at issue during his jury trial. The evidence offered was probative with regard to motive, as Rayborn's access to and control over church finances suggested that he would also have access to and control over the money received from the insurance company even though he is not a named beneficiary.

Finally, *Merriweather*'s three-part test involves an analysis under Rule 403, examining whether the probative value of the other acts evidence is substantially outweighed by its prejudicial effect. Because the evidence here deals with a pastor who may be betraying his church's trust, clearly there is cause

for concern that "despite the 'technical' admissibility of the other acts evidence, the jurors are more likely than not to use the evidence for the very purpose for which the first sentence of the rule states that it may not be used." *United States v. Hardy,* 228 F.3d 745, 750 (6th Cir. 2000). We do not believe that it was an abuse of discretion to admit this evidence. The district court carefully examined the probity and prejudicial value of each piece of evidence offered to show the defendant's control over church finances, by no means rubber-stamping all of the evidence the government sought to admit. For example, it determined that some of this evidence was too prejudicial, such as evidence of Rayborn's extramarital affair with a church member and government auditor Lisa Foster's detailed analysis of each expenditure to determine whether it was for personal or church use. Although the evidence that was ultimately admitted may have prejudiced Rayborn somewhat, we do not believe that the prejudicial nature of this evidence substantially outweighed its highly probative value. Therefore, the district court did not err in admitting the evidence.

D. Rebuttal Witness

Finally, Rayborn contends that the district court erred in permitting the government to recall Michael McGuire as a rebuttal witness. At trial, Johnny Allen testified as a rebuttal witness for the government. Because he had a longstanding relationship with Rayborn, however, the district court permitted the government to treat Allen as a hostile witness. While

testifying, Allen described his actions on the day of the fire, including entering the church to look around after the three women exited saying that they smelled smoke. On cross-examination, Allen said that when he looked into the vent in the kitchen, he saw what looked like "an electrical box or something" and it appeared as "just redness." Over the defense's objection, the government recalled Michael McGuire to impeach Allen's testimony. McGuire, who had previously been qualified as an expert in electrical engineering and investigation of electrical fires, testified that the National Electrical Code prohibits placement of a junction box or electrical box inside a vent where it could be seen.

"The decision of the trial court to admit evidence on rebuttal is reviewed for abuse of discretion." *United States v. Caraway,* 411 F.3d 679, 683 (6th Cir. 2005). Under Federal Rule of Evidence 611(a), "a district court must exercise reasonable control over the mode and order of presenting evidence with the goal that the presentation be effective for ascertaining the truth." *Id.*

On appeal, Rayborn argues that the district court abused its discretion in allowing McGuire to testify, because McGuire was used not to rebut evidence submitted by the defense but rather to rebut the testimony of the government's rebuttal witness, Allen. However, as accurately pointed out by the government, under both the Federal Rules of Evidence and case law of this Circuit, a party may impeach its own

witness. *See* Fed. R. Evid. 607; *United States v. Causey,* 834 F.2d 1277, 1282 (6th Cir. 1987).

In addition, Rayborn's reliance on *Caraway,* 411 F.3d at 683, and *Benedict v. United States,* 822 F.2d 1426, 1428 (6th Cir. 1987), is unavailing, as the language he quotes from these cases is incomplete. Rayborn contends that McGuire should not have testified, because the government did not call him to "rebut new evidence or new theories proffered in the defendant's case in chief," as is the purpose of rebuttal evidence. *Caraway,* 411 F.3d at 683 (quoting *Benedict,* 822 F.2d at 1428). Despite defense counsel's creative attempt, the entirety of the quoted language from *Benedict* contradicts Rayborn's argument: "[i]n the exercise of sound discretion, the district court *may* limit the scope of rebuttal testimony to that which is directed to rebut new evidence or new theories proffered in the defendant's case-in-chief." 822 F.2d at 1428 (emphasis added and internal citation omitted). Although the district court can limit rebuttal testimony, it is not required to do so and it is not an abuse of discretion not to impose such a limit. Therefore, the district court did not err in allowing McGuire to testify as a rebuttal witness for the government.

III.

For the reasons above, we **AFFIRM** Rayborn's convictions.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05-6894

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GERALD RAYBORN,

Defendant-Appellant.

Before: MARTIN and DAUGHTREY, Circuit Judges; SCHWARZER, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk